No. 83-812

In the Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE C. WALLACE, ET AL., APPELLANTS

v.

ISHMAEL JAFFREE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a state statute, which authorizes public school teachers to allow a brief moment of silence at the beginning of the school day for the purpose of "prayer or meditation," is invalid on its face under the Establishment Clause.

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INTEREST OF THE UNITED STATES

The State of Alabama, like some 22 other states, has authorized a moment of silence in the public schools to enable students to engage in silent voluntary prayer or meditation. The court below held this practice unconstitutional under the First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment. The United States has a substantial interest in this matter, which raises the question whether the Constitution prohibits neutral and noncoercive means of accommodating private religious practices in the public schools and, by extension, in other public contexts. Among federal government activities potentially implicated by a prohibition on governmental accommodation of religion are the grant of tax preferences for religious institutions, the allowance of religious holidays to federal employees, and the enforcement

of the religious accommodation requirements of Title VII of the Civil Rights Act of 1964.

In addition, the United States is authorized to operate schools for military and foreign service dependents under certain circumstances (10 U.S.C. 7204 (Navy); 20 U.S.C. (& Supp. V) 241 (federal property); 20 U.S.C. (Supp. V) 926 (Defense Department); 22 U.S.C. (Supp. V) 2701 (foreign service)) and schools for Indians (25 U.S.C. 271-304b). The resolution of this case will bear on Congress's ability to allow periods for silent prayer or meditation in such schools.

The United States has participated as a party or as amicus curiae in numerous cases arising under the Establishment and Free Exercise Clauses, most recently in *Marsh* v. *Chambers*, No. 82-23 (July 5, 1983) and *Lynch* v. *Donnelly*, No. 82-1256 (argued Oct. 4, 1983). See also briefs filed by the United States as amicus curiae in *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977); *Sloan* v. *Lemon*, 413 U.S. 825 (1973); *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976); and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), and briefs filed as a party in *United States* v. *Lee*, 455 U.S. 252 (1982), and *Tilton* v. *Richardson*, 403 U.S. 672 (1971).

STATEMENT

1. Appellee Ishmael Jaffree, an agnostic, filed this suit on behalf of three of his children who attend Mobile County, Alabama public schools, challenging certain teachers' practice of conducting prayers with students during school hours. *Jaffree* v. *Board of School Commissioners*, 554 F. Supp. 1104 (S.D. Ala. 1983) (J.S. App. 1d-55d). After the suit was filed but before it was decided by the district court, the state legislature enacted Senate Bill 8, 1982 Ala. Acts 82-735, codified at Ala. Code § 16-1-20.2 (Cum. Supp. 1982), permitting public school teachers and professors to lead willing students in recitation of a state-composed prayer at the beginning of any homeroom or class period.[1] Appellee amended his complaint to challenge the constitutionality of this statute and a previously-enacted provision, Ala. Code § 16-1-20.1 (Cum. Supp. 1982), which authorizes teachers to permit a minute of silence for meditation or voluntary prayer at the commencement of the first class period.[2] Appellee joined as defendants the Governor of Alabama, the state Attorney General, and several

[1] As enacted, Ala. Code § 16-1-20.2 (Cum. Supp. 1982) provides that:

> From henceforth, any teacher or professor in any public education institution within the State of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead willing students in prayer, or may lead the willing students in the following prayer to God:
>
> Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen.

[2] Ala. Code § 16-1-20.1 (Cum. Supp. 1982) provides that:

> At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

state education officials. *Jaffree* v. *James*, 544 F. Supp. 727 (S.D. Ala. 1982) (J.S. App. 56d-61d).

The district court severed appellee's claim challenging teacher-initiated prayer from his claim challenging the state statutes. Based on the court's view that "the establishment clause of the first amendment to the United States Constitution does not bar the states from establishing a religion" (J.S. App. 59d), it dismissed the challenge both to teacher-initiated prayers (*Jaffree* v. *Board of School Commissioners*, *supra*) and to the Alabama statutes (*Jaffree* v. *James*, *supra*) for failure to state a claim upon which relief could be granted (J.S. App. 53d, 59d). The court dissolved a preliminary injunction that it had previously entered barring implementation of the state statutes (J.S. App. 59d). Justice Powell, as Circuit Justice, issued an order granting a stay of the district court's order and reinstating the injunction pending final disposition of the appeal (J.S. App. 2e-5e).

2. The court of appeals reversed the dismissal of both of appellee's claims and remanded the case for entry of an order enjoining the implementation of the statutes and teacher-initiated prayers. *Jaffree* v. *Wallace*, 705 F.2d 1526 (11th Cir. 1983) (J.S. App. 1a-20a). The court concluded (J.S. App. 7a-12a) that the district court's interpretation of the First Amendment is contrary to cases decided by this Court, including *Everson* v. *Board of Education*, 330 U.S. 1 (1947); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948); *Abington School District* v. *Schempp*, 374 U.S. 203 (1963); and *Engel* v. *Vitale*, 370 U.S. 421, 429-430 (1962).[3] In one paragraph of its 20-page opinion (J.S. App. 18a), the court of appeals held the moment of silence statute unconstitutional because its objective was "the advancement of religion."[4] The court stated: "We do not imply that simple meditation or silence is barred from the public schools; we hold that the state cannot participate in the advancement of religious activities through any guise, including teacher-led meditation. It is not the activity itself that concerns us; it is the purpose of the activity." J.S. App. 18a.

[3] Because the district court viewed the Establishment Clause as not applicable to the states (J.S. App. 59d), it did not make factual findings concerning the purpose or consequences of the statutes in question, nor did it separately analyze the statutes. The court of appeals rejected the district court's interpretation of the reach of the Establishment Clause (J.S. App. 10a-11a), but did not remand for separate consideration and factual findings on the moment of silence issue. Instead, it held the moment of silence statute facially invalid (*id.* at 18a).

The court of appeals denied a petition for rehearing and rehearing en banc (J.S. App. 1b-2b). Four judges dissented from the denial of reconsideration en banc insofar as the decision invalidated Alabama's moment of silence statute (*id.* at 2b-4b). The dissenting judges observed first that the significance of the decision "transcends one state and one statute," because many other states have enacted similar laws (*id.* at 2b-3b). Second, the dissenting judges noted that the constitutionality of observing moments of silence in the public schools has not been resolved by

[4] The court based this conclusion (J.S. App. 18a) on a preliminary finding by the district court on a motion for a preliminary injunction. The district court, in turn, relied solely on testimony by a legislator "that his purpose in sponsoring § 16-1-20.1 was to return voluntary prayer to the public schools. He intended to provide children the opportunity of sharing in their [sic] spiritual heritage of Alabama and of the country." J.S. App. 71d. The district court reached no such finding in connection with its final judgment.

this Court, and that other courts have reached conflicting decisions (*id.* at 3b). Finally, the dissenting judges expressed "some doubt as to the correctness of the panel opinion" (*ibid.*), citing extensive scholarly and judicial authority in support of the constitutionality of moment of silence provisions (*id.* at 3b-4b). The judges concluded that "[h]owever the en banc court might resolve the issue, it is important and sufficiently unsettled to command its attention" (*id.* at 4b).

DISCUSSION

1. In 1962, this Court held that a state statute permitting the recitation of prayers by teachers in public schools was impermissible under the Establishment Clause, as applied to the states by the Fourteenth Amendment. *Engel* v. *Vitale*, 370 U.S. 421 (1962). Since that time, Alabama and some 22 other states have enacted statutes authorizing or requiring daily moments of silence in the public schools.[5] The constitutionality of these statutes is an

[5] In addition to Ala. Code § 16-1-20.1 (Cum. Supp. 1982), see Ariz. Rev. Stat. Ann. § 15-522 (Supp. 1983); Ark. Stat. Ann. § 80-1607.1 (repl. 1980); Conn. Gen. Stat. Ann. § 10-16a (West 1981); Fla. Stat. Ann. § 233.062 (West Cum. Supp. 1983); Ga. Code Ann. § 20-2-1050 (1982); Ill. Rev. Stat. ch. 122, ¶ 771 (Cum. Supp. 1983); Ind. Code Ann. § 20-10.1-7-11 (Burns Cum. Supp. 1983); Kan. Stat. Ann. § 72.5308a (1980); La. Rev. Stat. Ann. § 17:2115 (West 1982); Me. Rev. Stat. Ann. tit. 20-A, § 4805 (1982); Md. Educ. Code Ann. § 7-104 (1978); Mass. Ann. Laws ch. 71, § 1A (Michie/Law. Co-op. Cum. Supp. 1983); Mich. Comp. Laws § 380.1565 (1979); N.J. Rev. Stat. § 18A:36-4 (Cum. Supp. 1983); N.M. Stat. Ann. § 22-5-4.1 (1981); N.Y. Educ. Law § 3029-a (McKinney 1981); N.D. Cent. Code § 15-47-30.1 (1981); Ohio Rev. Code Ann. § 3313.601 (Page 1980); Pa. Stat. Ann. tit. 24, § 15.1516.1 (Purdon Cum. Supp. 1983); R.I. Gen. Laws § 16-12-3.1 (repl. 1981); Tenn. Code Ann. § 49-1922 (Supp. 1982); Va. Code § 22.1-203 (repl. 1980).

issue of first impression for this Court. Justice Brennan stated in his concurring opinion in *Abington School District* v. *Schempp*, 374 U.S. 203, 281 (1963), that "the observance of a moment of reverent silence at the opening of class" might be considered a "nonreligious means" of serving "solely secular purposes * * * without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government." The federal and state courts to consider the issue have reached divided conclusions.[6] Many prominent scholars and legal authorities have defended the constitutionality of moment of silence statutes,[7] but not without dissent.[8]

[6] Moment of silence statutes have been upheld or approved in *Gaines* v. *Anderson*, 421 F. Supp. 337 (D. Mass. 1976) (three-judge court), and *Opinion of the Justices*, 113 N.H. 297, 301, 307 A.2d 558, 560 (1973). Such statutes have been struck down in *May* v. *Cooperman*, No. 83-89 (D. N.J. Oct. 24, 1983); *Duffy* v. *Las Cruces Public Schools*, 557 F. Supp. 1013 (D. N.M. 1983); and *Beck* v. *McElrath*, 548 F. Supp. 1161 (M.D. Tenn. 1982), as well as by the court of appeals below.

[7] See, *e.g.*, L. Tribe, *American Constitutional Law*, § 14-6, at 829 (1978); P. Freund, *The Legal Issue*, in Religion in the Public Schools 23 (1965); Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 Minn. L. Rev. 329, 371 (1963); Kauper, *Prayer, Public Schools and the Supreme Court*, 61 Mich. L. Rev. 1031, 1041 (1963); Comment, *Accommodating Religion in the Public Schools*, 59 Neb. L. Rev. 425, 450-454 (1980); Note, *Religion and the Public Schools*, 20 Vand. L. Rev. 1078, 1092-1093 (1967); Op. Tenn. Att'y Gen. No. 82-153 (1982).

[8] See, *e.g.*, Note, *The Unconstitutionality Of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 Harv. L. Rev. 1874 (1983); Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U.L.

In an opinion largely devoted to other issues—*i.e.*, audible public school prayers conducted by school authorities—the court of appeals held unconstitutional Ala. Code § 16-1-20.1 (Cum. Supp. 1982), which authorizes public school teachers at the beginning of the school day to "announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer." The court rested this judgment on a finding that the moment of silence statute lacks a "secular legislative purpose" and has "the primary effect of advancing religion" (J.S. App. 18a). Since there is no evidence in the record regarding whether or how the statute has been implemented, and the court of appeals did not cite any specific features of the statute as a basis for its holding, the judgment must be considered one of facial invalidity, of potentially wide application. For the reasons stated by Judges Roney, Tjoflat, Hill, and Fay, dissenting from denial of the petition for rehearing en banc in the court of appeals—that the decision affects the resolution of similar issues in other states; that there is no controlling precedent governing resolution of the issue; and that the decision below may well be incorrect (J.S. App. 2b-4b)—we believe that this case raises a serious and unsettled question of constitutional law warranting plenary consideration by this Court.[9]

Rev. 364 (1983). The Attorney General of New Jersey declined to defend that State's moment of silence statute in *May* v. *Cooperman, supra,* believing it to be unconstitutional.

[9] While there are variations among state moment of silence statutes, we have concluded that there are no differences of constitutional dimension between the Alabama moment of silence statute and the others that would diminish the precedential impact of this Court's disposition of this appeal, or that would detract from the appropriateness of this case as a vehicle for addressing the general question. In particular, we do not consider it constitutionally significant whether the statute contains the word "prayer," so long as it does not purport to require prayer or to prohibit non-religious uses of the moment of silence. Compare *Gaines* v. *Anderson, supra* (upholding moment of silence statute containing the word "prayer") with *May* v. *Cooperman, supra* (striking down moment of silence statute containing no reference to "prayer" or any other form of religious activity).

2. More fundamentally, we submit that the moment of silence issue raises questions of interpretation of the Religion Clauses of the First Amendment of significance far beyond the particulars of this or similar statutes. This case would provide an opportunity for the Court to consider the legitimacy of governmental efforts to accommodate the interests of individuals of religious conviction in the public schools and, by implication, in other contexts where religious practice may require the permission or cooperation of government. Since *Zorach* v. *Clauson,* 343 U.S. 306 (1952), this Court has not provided substantial guidance on how federal, state, and local governments can "accommodate[] the public service to [our people's] spiritual needs." *Id.* at 314. This case also presents an apt opportunity for this Court to evaluate the trend of state and lower federal court decisions which increasingly, in Justice Goldberg's words, "partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Schempp,* 374 U.S. at 306 (concurring opinion).

The fundamental impulse that led to adoption of the Religion Clauses of the First Amendment was the desire to allow free rein to religious practice without the interference that federal prohibitions or establishments would necessarily entail. The touchstone is not secularism, but pluralism. Moment of silence statutes are libertarian in the precise spirit of the Bill of Rights: they accommodate those who believe that prayer should be an integral part of life's activities (including school), and do so in the most neutral and noncoercive spirit possible. The student may pray, but is equally free to meditate or daydream or doze. No one can even know what the other chooses to do: silence is precious because it creates the possibility of privacy within public occasions. To hold that the moment of silence is unconstitutional is to insist that any opportunity for religious practice, even in the unspoken thoughts of schoolchildren, be extirpated from the public sphere. It is to be censorial where the Religion Clauses are libertarian; it would make the very concept of religious accommodation constitutionally suspect.

This Court has not so rigidly interpreted the Establishment Clause as to preclude governmental accommodation of religion. To the contrary, in some contexts the Court has found particular forms of accommodation constitutionally required under the Free Exercise Clause, despite the fact that the accommodation has the undeniable effect of encouraging religious practice. See *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Sherbert* v. *Verner*, 374 U.S. 398 (1963). Still more common are governmental accommodations to religion not mandated by the Free Exercise Clause, but nonetheless permissible under the Establishment

Clause.[10] As this Court stated in *Zorach* (343 U.S. at 313-314):

> "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Accord, *Walz* v. *Tax Commission*, 397 U.S. 664, 673 (1970). As Justice Brennan has stated, "even when

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[10] *McDaniel* v. *Paty*, 435 U.S. 618, 639 (1978) (Brennan, J. concurring). See, *e.g.*, *Mueller* v. *Allen*, No. 82-195 (June 29, 1983) (tuition tax credits); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981) (exemption of religious school employees from unemployment taxes); *Gillette* v. *United States*, 401 U.S. 437 (1971) (exemptions from compulsory military service for religious objectors); *Walz* v. *Tax Commission*, *supra* (property tax exemptions for religious organizations); *Arlans Dep't Store, Inc.* v. *Kentucky*, 371 U.S. 218 (1962) (dismissing for want of a substantial federal question an appeal challenging the constitutionality of exemptions from Sunday closing laws for the benefit of Sabbatarians); *McGowan* v. *Maryland*, 366 U.S. 420 (1961) (Sunday closing laws); *Zorach* v. *Clauson*, *supra* (off-premises public school release time programs); *Quick Bear* v. *Leupp*, 210 U.S. 50 (1908) (use of Indian trust monies for sectarian education). Cf. *Widmar* v. *Vincent*, 454 U.S. 263 (1981) (striking down prohibition on religious group meetings on public university campus); *McDaniel* v. *Paty*, *supra* (striking down prohibition on service by ministers as delegates to state constitutional convention).

the government is not compelled to do so by the Free Exercise Clause, it may to some extent act to facilitate the opportunities of individuals to practice their religion." *Marsh* v. *Chambers*, No. 82-23 (July 5, 1983), slip op. 17 (dissenting opinion). In a similar vein, Justice Rehnquist has suggested that "governmental assistance which does not have the effect of 'inducing' religious belief, but instead merely 'accommodates' or implements an independent religious choice does not impermissibly involve the government in religious choices and therefore does not violate the Establishment Clause of the First Amendment." *Thomas* v. *Review Board*, 450 U.S. at 727 (dissenting opinion). See also *Widmar* v. *Vincent*, 454 U.S. 263, 282 (1981) (White, J., dissenting).

In this context, we are concerned that the three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), has been understood by many state and lower federal courts, including the court below, as precluding virtually all governmental accommodations of religion.[11] These courts have viewed accommodation as a non-"secular" (hence impermissible) purpose, and have viewed the creation of opportunities for religious practice as having the primary effect of "advancing"

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[11] Of particular concern to the United States are Sections 701(j) and 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. 2000e(j), 2000e-2(a)(1), which promote the values of "religious pluralism" in the workplace. *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting). These provisions of Title VII require employers to make "reasonable accommodation," short of "undue hardship," to the religious needs and practices of their employees. For example, an employer must make reasonable accommodation to a Sabbatarian employee's desire not to work on Saturdays,

religion.[12] However, as the continued authority of *Zorach* and *Walz* demonstrates, no such drastic surgery has been performed on the concept of religious accommodation. Plainly, a subtler analysis is required to draw meaningful distinctions in this sensitive area.

The court of appeals' focus on legislative motivation in this case (J.S. App. 18a) exemplifies this rigid understanding of the Establishment Clause. The court apparently believed that the moment of silence statute is unconstitutional simply because it was intended to provide an opportunity for so-minded students to pray. But it matters not that some legislators may have harbored the hope that some students would in fact use the opportunity provided for religious ends, so long as the means chosen by the legislature is found to be within the bounds of permissible accommodation. See *Mueller* v. *Allen*, No. 82-195 (June 29, 1983) slip op. 6. The whole point of religious accommodation is to create opportunities for persons to pursue their own beliefs and thus to provide an environment in which "*voluntary* religious exercise may flourish." *McDaniel* v. *Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring) (emphasis added).

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even though there is no comparable obligation to accommodate the desire of another employee, based on nonreligious grounds, not to work on Saturdays. See 118 Cong. Rec. 705 (1972) (statement of Sen. Jennings Randolph). We were dismayed to learn that a court recently struck down a provision of state law similar to these religious accommodation provisions of Title VII, applying essentially the same approach to the *Lemon* test as was applied by the court below. *Caldor, Inc.* v. *Thornton*, 191 Conn. 336, 464 A.2d 785 (1983).

[12] But see, *e.g.*, *Lanner* v. *Wimmer*, 662 F.2d 1349, 1359 (10th Cir. 1981); *O'Hair* v. *Andrus*, 613 F.2d 931 (D.C. Cir. 1979); *Smith* v. *Smith*, 523 F.2d 121, 124-125 (4th Cir. 1975), cert. denied, 423 U.S. 1073 (1976).

Nor should the apparent hostility of some of Alabama's legislators to this Court's decisions in *Schempp* and *Engel* be considered fatal to the constitutionality of the moment of silence. Government officials are required to comply with judicial decisions, not to speak well of them. The moment of silence statute need not be viewed as a "guise" for evading this Court's decisions (J.S. App. 18a); rather, the statute can more fairly be understood as an attempt—even if a grudging attempt—to comply with them. See *Gaines* v. *Anderson*, 421 F. Supp. at 341.

The special character of the public school classroom necessarily heightens sensitivity to possible problems under the Religion Clauses. But that special character accentuates the need for toleration and accommodation; it does not mean that students are required to shed their religious beliefs and practices at the schoolhouse gate. Cf. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). It was precisely in the context of public schools that this Court commended efforts to encourage and cooperate with the religious needs of students as "follow[ing] the best of our traditions." *Zorach*, 343 U.S. at 314. Attendance at elementary and secondary schools is compulsory, and it constitutes a major portion of the pupils' time and activity. To those who regard prayer as intrinsic to all of their activities, the opportunity for prayer at school thus assumes a special importance. Failure to accommodate the religious needs of students in the years since *Schempp* and *Engel* has contributed to the exodus of many religious students, especially Christian fundamentalists and evangelicals, from the public schools, much as the failure to accommodate the distinctive religious needs of Jewish and

Roman Catholic students in an earlier era induced them to abandon public schools and form private school systems of their own. The values of pluralism and diversity in our public schools suffer needlessly from a reading of the Establishment Clause that destroys the possibility of accommodating, in a spirit of toleration, voluntary religious practices of the sort involved in this case.

Permitting school children to maintain a moment of silence in the public schools presents no threat to the values protected by the Establishment Clause. It evinces a "benevolent neutrality" (*Walz*, 397 U.S. at 669) in keeping with the libertarian spirit of both Religion Clauses. We submit, therefore, that the court of appeals decision invalidating Alabama's moment of silence statute warrants plenary review. We believe it would be unfortunate for an issue of this importance to be resolved summarily.

3. In focusing our attention and the attention of the Court on the moment of silence issue, we do not intend to minimize the importance of the broader issues raised by the appellants here, or by the petitioners and appellants in Nos. 83-804 and 83-929. Indeed, the President and the Department of Justice have urged reexamination in another forum of the wider school prayer issues raised by appellants and petitioners. See S.J. Res. 73, 98th Cong., 1st Sess. (1983) (President's proposed constitutional amendment permitting voluntary prayer in the public schools); *Proposed Constitutional Amendments Relating to School Prayer: Hearings Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983) (Statement of Hon. Edward C. Schmults, Deputy Att'y Gen. of the United States). We recognize that, with respect to these wider school prayer issues, the

question for the Court is whether it now wishes to engage in a reappraisal of its precedents. However the Court may answer that question, we submit that the moment of silence issue—which is an important question of first impression in this Court—should not be allowed to be engulfed in these wider waters, as was the case, we fear, in the court of appeals. The moment of silence issue provides a unique opportunity in a discrete context not yet addressed by this Court to take a fresh look at the tests for distinguishing between establishments of religion on the one hand, and permissible instances of accommodation of and toleration for private religious beliefs and practices, on the other.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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